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DATE: March 19, 1999

CASE NO: 1998-ERA-37

In the Matter of

MARK GRAF,
Complainant,

v.

WACKENHUT SERVICES LLC,
Respondent.

ORDER GRANTING MOTION TO COMPEL, IN PART
AND GRANTING PROTECTIVE ORDER

This case arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (the "ERA" or "Act"), and the regulations promulgated thereunder at 29 C.F.R. Part 24. A formal hearing is currently scheduled before the undersigned administrative law judge on April 5, 1999 in Denver, Colorado. The pre-hearing deadline for completing discovery has been set for Friday, March 26, 1999.

BACKGROUND

On January 25, 1999, Complainant filed a Motion to Compel Respondent to file answers to several interrogatories and document production requests, and to make two of Respondent's employees available for depositions. On January 26, 1999, Respondent filed a Response to Complainant's Motion to Compel. Respondent filed a request for a protective order on January 27, 1999.

On February 1, 1999, the undersigned issued an Order granting in part Complainant's Motion to Compel, and granting Respondent's Motion for Protective Order. Therein, Respondent was ordered to answer Complainant's Request for Production No. 21, which requested "copies of documents explaining disciplinary actions taken against any employees for violation of information release regulations." Said order was contingent upon the issuance of an appropriate protective order. In addition, the parties were ordered to enter into a protective order to shield Respondent's employees from embarrassment by keeping confidential any information obtained at future depositions concerning their disciplinary and medical records. Counsel for both parties were unable to agree on the conditions and precautions to be contained in a protective order. As such, the undersigned issued an appropriate Protective Order on February 18, 1999, to protect the privacy of Respondent's employees whose disciplinary and medical information might be released to Complainant in response to either Request for Production No. 21 or future depositions.

On March 12, 1999, Complainant filed a "Second Motion to Compel Respondent's Compliance with Discovery Orders." Therein, Complainant argues that Respondent should be compelled to answer document production requests[1] and deposition questions pertaining to "comparator information relating to the disparate treatment of whistleblowers." On March 17, 1999, Respondent filed a "Response to Second Motion to Compel and Cross Motion for Protective Order." Respondent objects to the scope of Complainant's discovery requests on the grounds that they are overly broad, burdensome and irrelevant. Respondent also asserts the attorney client and attorney work product privileges. On March 19, 1999, Complainant filed a "Response to Respondent's Cross-Motion for a Protective Order."

DISCUSSION

Title 29 of the Code of Federal Regulations sets forth Rules of Practice and Procedure that are generally applicable in administrative hearings before the Office of Administrative Law Judges. See 29 C.F.R. Part 18. When those rules are "inconsistent with a rule of special application as provided by statute, executive order or regulation," the latter controls. 29 C.F.R. § 18(a). The Federal Rules of Civil Procedure apply to situations not controlled by 29 C.F.R. Part 18 or the rules of special application. See id.

Section 18.14 of the Rules of Practice and Procedure governs the scope of discovery. The test for determining whether material is discoverable is relevancy to the subject matter of the litigation. 29 C.F.R. § 18.14(a); Cf Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980). There is no requirement that the information sought be admissible at trial. 29 C.F.R. § 18.14(b); Cf Rich v. Martin Marietta Corp., 522 F.2d 333, 343 (10th Cir. 1975). Determinations on admissibility are made at trial. 29 C.F.R. § 18.14(b); Cf Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 998 (10th Cir. 1965).

Courts have permitted a very broad scope of discovery in discrimination cases. "Since direct evidence of discrimination is rarely obtainable, plaintiffs must rely on circumstantial evidence and statistical data, and evidence of an employer's overall employment practices may be essential to plaintiff's prima facie case." Morrison v. City and County of Denver, 80 F.R.D. 289, 292 (D. Colo. 1978), citing Rich, 552 F.2d at 333. When disciplinary action is involved, "the past practice of the employer in similar situations is relevant to determining whether there has been disparate treatment, which may provide highly probative evidence of retaliatory intent." Timmons v. Mattingly Testing Svcs., 95-ERA-40 (ARB June 21, 1996) (citations omitted). "If the information sought promises to be particularly cogent to the case, the defendant must be required to shoulder the burden." See Rich, 522 F.2d at 343.

Nevertheless, the "desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the need and the rights of both [parties]." Burks v. Oklahoma Publishing Co., 81 F.3d 975, 981 (10th Cir. 1996). "[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." Hickman v. Taylor, 329 U.S. 495, 506 (1947). As indicated by Section 18.14, privileged information is not discoverable absent "a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 29 C.F.R. § 18.14(a), (c). Moreover, Section 18.15 provides that further limitations come into existence when inquires cause a party or person embarrassment or undue burden. 29 C.F.R. § 18.15(a).

Complainant's Discovery Requests

Whistleblowers

First, Complainant seeks an order compelling Respondent to answer the following document production request:

> With the exception of financial data, identify and produce all documents in your possession, custody or control pertaining to whistleblower(s) who were Wackenhut employees for any time between January 1, 1992 and the present.

Likewise, Complainant seeks an order compelling Respondent to cooperate in depositions concerning the discovery of the above-mentioned information. Counsel for Complainant has agreed to enter into a protective order to ensure that the privacy interests of the employees are kept secure.

Respondent objects to the production of this information on the grounds of relevancy and overbreadth because the Complainant seeks "all documents" relating to whistleblowers. At a minimum, Respondent argues that the scope of this request must be

limited to documents maintained by its Human Resources Department. Moreover, Respondent asserts that confidential settlement information should be excluded as well as information protected by the attorney client and attorney work product privileges.

Relevancy is the principle inquiry for general objections that discovery requests are burdensome or too broad. See Green v. Raymond, 41 F.R.D. 11, 14 (D. Colo. 1966). In this case, Complainant seeks "all documents in [Respondent's] possession, custody or control pertaining to whistleblower(s)" within the specified time period. Complainant plans to use said information to establish his allegations of retaliatory animus under the ERA. In the pleadings, Complainant asserts that Respondent took disciplinary actions against him for disseminating information to the media and others. Respondent asserts that any disciplinary action taken against Complainant was due to Complainant's alleged breach of its security measures. It follows that Complainant is entitled to discover information pertaining to Respondent's past disciplinary practices involving employees that have participated, or sought to participate, in whistleblower activities. See Timmons, 95-ERA-40.

Nevertheless, I find that Complainant's request for "all documents . . . pertaining to whistleblowers" is overly broad and burdensome. Respondent proposes to limit this request to the following: a) the personnel file; b) documents maintained by the Human Resources Department relating to whistleblower activities; c) all other correspondence and memos maintained by the Human Resources Department relating to whistleblowers; d) memos reflecting in-house investigations into whistleblower complaints, providing that the production of these documents does not waive the attorney client privilege; and e) the EAP file.[2]

Complainant argues that Respondent should not be permitted to limit its responses to documents maintained in the Human Resources Department. Complainant believes that "Wackenhut General Managers Gillison and Cosgrove may have their own notes and files, which would not necessarily be kept in the Human Resources Department." In addition, Complainant alleges that Mssrs. Gillison and Cosgrove stated in their depositions "that their higher authority gave them orders to take action against Peters or Graf."

Based on the foregoing, I find that the scope of this request should be limited to 1) documents maintained by the Human Resources Department, as detailed above; and 2) to documents in the possession, custody or control of Mr. Gillison, Mr. Cosgrove and/or their superiors pertaining to whistleblower activities. It appears that tailoring the request in this manner will enable Complainant to discover information pertaining to Respondent's past disciplinary practices without requiring Respondent to produce information that is not reasonably calculated to lead to the discovery of admissible evidence. The scope of future depositions should also be limited accordingly.

Respondent also argues that settlement documents and privilege communications should be excluded from the above-mentioned request. Complainant has failed to establish the need for discovering the settlement documents themselves. Nonetheless, the facts underlying settlement agreements entered into between Respondent and whistleblowers are clearly discoverable and should be sufficient. See Brown v. Holmes and Narver, Inc., 90-ERA-26 (Sec'y May 11, 1994). Likewise, Respondent may withhold information, otherwise discoverable, "by claiming that it is privileged or subject to protection as trial preparation material," provided that Respondent makes the claim expressly and sufficiently describes the documents pursuant to Rule 26 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(b)(5).

Finally, Respondent argues that the information sought is sensitive and the kind that the other employees would expect to be held in confidence. In this case, Complainant's right to discover circumstantial evidence of discrimination outweighs the employees right to privacy. Nevertheless, the employees' privacy interest may be protected by a protective order.

Gary Cupp and Jeff Peters

Second, Complainant seeks an order compelling Respondent to answer the following document production requests:

> With the exception of financial data, identify and produce all documents in your possession, custody and control pertaining to Gary Cupp.
> If not already produced, identify and produce all written statements made by Gary Cupp in your possession, custody and control.
> With the exception of financial data, identify and produce all documents in your possession, custody and control pertaining to Jeffrey Peters.

Likewise, Complainant seeks an order compelling Respondent to cooperate in depositions concerning the discovery of the above-mentioned information.

Again, the parties present arguments pertaining to the relevancy and scope of these requests. Upon careful consideration of their arguments, I find that the discovery requests pertaining to Mssrs. Cupp and Peters should also be subject to the same limitations set forth in the "whistleblower" section above.

Employees Who Have Been Disciplined or Investigated

Third, Complainant seeks an order compelling Respondent to answer the following document production request:

> With the exception of financial data, identify and produce all documents in your possession, custody or control pertaining to Wackenhut employee(s) who have been disciplined or investigated (even if not disciplined) for violating any rule, instruction, policy, or procedure at Rocky Flats from January 1, 19992 to present. This requirement is intended to include, but is not limited to, the persons listed in MG 1605-1614.

Likewise, Complainant seeks an order compelling Respondent to cooperate in depositions concerning the discovery of said information. Complainant argues that OPM investigators discovered the same or similar information, and used said information for comparative purposes. As such, Complainant argues that he should be entitled to discover said information to establish discriminatory animus.

Respondent objects to the production of this information on the grounds of relevancy and overbreadth. Respondent argues that this is essentially a broader version of the above-mentioned request which specifically pertains to whisteblowers. Additionally, Respondent asserts that "the scope of this request is completely unmanageable and it encompasses a variety of irrelevant and confidential information. Arguably, this request could be interpreted to require Wackenhut to disclose all personnel information, medical information, disciplin[ary] information, and training information on every Wackenhut employee who has been disciplined for sleeping on the job, running a stop sign, or insubordination."

I find that complying with this discovery request would place an undue burden on Respondent. To the extent that Complainant seeks to discover disciplinary action of same or similarly situated employees, said information will be provided in response to the whistleblower request discussed above.

Complaints and Settlement Agreements

Finally, Complainant seeks an order compelling Respondent to answer the following document production requests:

> Identify and produce all complaints in your possession, custody or control that were filed by a Wackenhut employee or former employee with any government agency, administrative forum or court of law.
> Identify and produce all settlement agreements in your possession, custody or control that refer to any person who filed a complaint with any government agency, administrative forum or court of law.

Likewise, Complainant seeks an order compelling Respondent to cooperate in depositions concerning the discovery of said information.

Respondent objects to the production of this information. Respondent argues that "Complainant has failed to demonstrate the relevancy of information relating to the general category of complaints" or settlement agreements. In contrast, Complainant argues that said information "may provide names and information of other comparators."

I find that this discovery request is too broad and burdensome. To the extent that Complainant seeks to discover disciplinary actions taken against same or similarly situated employees, said information will be provided in response to the whistleblower request discussed above. As I previously discussed, Complainant may discover the facts underlying the settlement agreements entered into between Respondent and whistleblowers. Nevertheless, Complainant has failed to establish the need for discovering this general category of complaints and settlement agreements.

ORDER

Accordingly, and based on the above, it is **ORDERED** that:

1. Respondent is **ORDERED** to answer the following discovery request: With the exception of financial data, identify and produce all documents in your possession, custody or control pertaining to whistleblower(s) who were Wackenhut employees for any time between January 1, 1992 and the present. "All documents" shall be interpreted to mean a) documents contained in the personnel file; b) documents maintained by the Human Resources Department relating to whistleblower activities; c) all other correspondence and memos maintained by the Human Resources Department relating to whistleblowers; d) memos reflecting in-house investigations into whistleblower complaints, providing that said documents are not privileged; and e) the EAP file.[3] Respondent may withhold a) settlement agreements; and b) information covered by the attorney client or attorney work product privileges, pursuant to Fed. R. Civ. P. 26(b)(5). Likewise, Respondent is **ORDERED** to answer deposition questions pertaining to the above-mentioned documents. To protect the privacy of the employees whose information shall be released, it is **ORDERED** that information disclosed under this discovery request shall be governed by the terms of the Protective Order issued on February 18, 1999.

[Page 8]

2. Respondent is **ORDERED** to answer the following discovery request: With the exception of financial data, identify and produce all documents in the possession, custody or control of Mr. Gillison, Mr. Cosgrove, and/or their superiors pertaining to whistleblower activities at Wackenhut between January 1, 1992 and the present. Respondent may withhold a) settlement agreements; and b) information covered by the attorney client or attorney work product privileges, pursuant to Fed. R. Civ. P. 26(b)(5). Likewise, Respondent is **ORDERED** to answer deposition questions pertaining to the above-mentioned documents. To protect the privacy of the employees whose information shall be released, it is **ORDERED**

that information disclosed under this discovery request shall be governed by the terms of the Protective Order issued on February 18, 1999.

3. Respondent is **ORDERED** to answer the discovery requests specifically pertaining to Gary Cupp and Jeff Peters. The terms "all documents" and "all written statements" shall be interpreted to mean a) documents contained in the personnel file; b) documents maintained by the Human Resources Department relating to whistleblower activities; c) all other correspondence and memos maintained by the Human Resources Department relating to whistleblowers; d) memos reflecting in-house investigations into whistleblower complaints, providing that said documents are not privileged; and e) the EAP file. Respondent may withhold a) settlement agreements; and b) information covered by the attorney client or attorney work product privileges, pursuant to Fed. R. Civ. P. 26(b)(5). Likewise, Respondent is **ORDERED** to answer deposition questions pertaining to the above-mentioned documents. To protect the privacy of the employees whose information shall be released, it is **ORDERED** that information disclosed under this discovery request shall be governed by the terms of the Protective Order issued on February 18, 1999.

4. Complainant's Motion to Compel Respondent to answer all other discovery requests discussed herein is **DENIED**.

5. The Protective Order issued in this matter on February 18, 1999, is incorporated by reference.

Entered this 19th day of March, 1999, at Long Beach, California.

DANIEL L. STEWART
Administrative Law Judge

DLS: cdk

[ENDNOTES]

[1]These requests are broader than Request for Production No. 21, which was limited to employees disciplined "for violati[ng] of information release regulations."

[2]On March 18, 1999, counsel for Respondent explained to my law clerk that the "EAP file" is a medical file containing psychiatric evaluations of employees.

[3]On March 18, 1999, counsel for Respondent explained to my law clerk that the "EAP file" is a medical file containing psychiatric evaluations of employees.